Supreme Court, U.S.
FILED

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In The

Supreme Court of the United States

October Term, 1997

LOIS KAY STEERE,

Petitioner,

vs.

JEPPESEN SANDERSON, INC.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Where an employer artificially creates an "overstaffing" situation which ultimately provides the opportunity to terminate the female plaintiff as a "reduction in force" is the employer required to articulate a non-discriminatory reason for creating the "overstaffing" to meet its burden of production under *McDonnell Douglas v. Green.*

LIST OF PARTIES

The names of all parties to the proceedings in the Court whose judgment is sought to be reviewed here appear in the caption for the case. There is no parent or subsidiary company of any party to be listed.

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Petitioner, Lois Kay Steere, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 108 F.3d 341 (10th Cir. 1997) as unpublished but is reproduced in the Appendix filed herewith ("App.") at 1a. The other unreported opinions of the district court in this case are reproduced at 8a and 25a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its Order on Petitioner's Motion for a Rehearing on April 2, 1997 (App. E, 46a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The pertinent provision of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.* ("Title VII") is set forth below:

§ 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of

> employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

A. Nature Of The Case, Course Of Proceedings And Disposition In The Court Below.

The Petitioner, Lois Kay Steere (Steere) was terminated by Jeppesen Sanderson, Inc., (JSI) effective December 10, 1993. She was given two weeks pay in lieu of notice and seven weeks pay as severance and compensation for any unused holidays and vacation. Steere timely filed a charge of sex and/or age discrimination with the Colorado Civil Rights Division (CCRD) on January 4, 1994. (Pltf. Ex. 9, Appendix filed with the Tenth Circuit pp. 59-86). The CCRD then sent the charge to the Equal Employment Opportunity Commission (EEOC) for "dual filing purposes." After an investigation, the CCRD on June 17, 1994 issued a right to sue letter and terminated its investigation. On September 15, 1994, Steere timely filed her complaint (94-CV-2103) in the Arapahoe County District Court, the State Court of general jurisdiction for the State of Colorado. On October 5, 1994, JSI removed the action to federal court. After a trial to the court, which resulted in a judgment for the defendant, Steere timely filed her Notice of Appeal to the United States Court of Appeals for the Tenth Circuit on February 2, 1996.

On March 3, 1997 the United States Court of Appeals for the Tenth Circuit filed its Order and Judgment affirming the District Court (App. A, 1a). Steere filed a Motion to Supplement the Record on Appeal and timely filed a Petition for Rehearing with the Tenth Circuit. An Order filed April 2, 1997 by the Tenth Circuit denied the Motion to Supplement the Record on Appeal and denied the Petition for Rehearing as moot (App. E, 46a).

B. Facts Relevant To The Issues Presented For Review.

Steere, a female, was hired by JSI on September 15, 1986 as an analyst in the Aviation Information Section (AIS), Englewood, Colorado. She was employed as a senior analyst in AIS until her employment was terminated by JSI on December 10, 1993, after JSI advised her that her position was being eliminated to reduce the number of employees in her work section. JSI is a publisher of flight information, training aids, and audiovisual programs for airlines, pilots, and general aviation markets throughout the world. According to JSI, a senior flight information analyst's job is to analyze flight information source material received from the governments of different countries to determine its effect on JSI charts, texts, and automated systems to resolve conflicted or questionable flight information. Analysts also screen and disseminate such material to the appropriate section for processing. (Findings of Fact, Conclusions of Law and Order, App. C, 8a-24a).

Steere holds a United States airline transport pilot certificate, a single-engine commercial pilot certificate with instrument rating, certified flight instructor certificate for airplanes single-engine land, multi-engine land and instrument, advanced ground instructor certificates. Steere has accumulated approximately 4000 hours of flight. (Steere testimony, Appendix filed with the Tenth Circuit pp. 38, 39).

JSI maintained an office in Washington, D.C. to obtain

Federal Aviation Administration (FAA) flight information and transmit it to the Englewood office. In 1993, JSI decided to reduce its employees in the Washington, D.C. office from three to two employees. In June, JSI offered one of the Washington employees, Thomas Lawson (Lawson), a male, the choice of being laid off or relocating to the Englewood office. Lawson, a JSI employee for 21 years, accepted relocation. (Finding of Fact, Conclusions of Law and Order, App. C, 9a).

Lawson transferred to Englewood and was assigned to the AIS section which resulted in that section being over staffed by one analyst position. Rather than acting immediately to correct the overstaffing, JSI decided to wait until someone left the section voluntarily or until the end of the calendar year. On November 20, 1995, no one having left AIS, Horst Bergmann, company president, wrote a memorandum to management to act immediately to reduce AIS by one position. According to Robert Muller, JSI's human resources director, he met with AIS supervisor Greg Fisher, Doug Higgins, manager of data development, and Don Sellars, director of flight information data and design to make the decision as to which AIS employee would be laid off. The management group evaluated each of the twelve AIS analyst's "past performance, evaluations, knowledge, skills, ability, and past individual contributions" and decided to lay off Steere.

The District Court's opinion appears to conclusively presume that Steere established a prima facie case of sexual discrimination with respect to the "overstaffing" of AIS with Lawson and her termination (App. C, 15a-16a and App. D, 32a-35a District Court's Order of November 28, 1995 on JSI's Motion for Summary Judgment).

At the time of Lawson's transfer to Colorado, he possessed none of Steere's qualifications as a senior analyst. As a matter of fact, Lawson was not even qualified as a junior analyst. The

AIS was not subject to a work over load. No explanation was given as to why Lawson was assigned to AIS. No vacant position existed in that section at the time. The Senior Vice President of JSI, who actually made the final decision to offer a termination package or a transfer to the Englewood, Colorado office, simply testified that he recommended that Lawson be assigned to AIS. Lawson was continued at his Washington, D.C. pay rate which exceeded the equivalent Colorado pay rate. JSI paid Lawson's relocation expenses to Colorado. JSI had to train Lawson after his transfer to do the work of a "flight information analyst." There was no evidence presented concerning different budgetary restraints after Lawson's transfer than existed before his arrival in the Colorado office. JSI presented no evidence of a reorganization of the AIS prior to or at the time of Lawson's transfer or the exercise of re-employment or restoration rights or reclassification of an employee's position due to an erosion of duties. In Steere's view the record is simply devoid of any explanation, non-discriminatory or otherwise, for JSI's creation of the AIS "overstaffing" by the addition of Lawson.

Without an explanation of this artificial "overstaffing," Steere believes that the "RIF" of the AIS was a disguise or a "pretext" to terminate her for reasons that were sexually discriminating and personal. These reasons were not pertinent to the company's work-force as a whole. This conclusion is further supported by the dissimilar treatment of the male members of the AIS, Messrs. Pakiz and Vaughn, whose performance and attitude were documented as severe or worse than Steere. This information, however, was not reflected in the grading criteria which lead to Steere's termination.

Judge Babcock's District Court findings and conclusions (App. C, 16a) state that:

> [t]he evidence established that JSI made a legitimate and good faith business decision

> that the AIS department was overstaffed. JSI then made another legitimate and good faith business decision to deal with the overstaffing by laying off one AIS analyst.

However, Steere insists that the pretext in this case consisted of both the "setup" and the "take out." Thus, the District Court ruling dealt with the JSI explanation or "burden of production" for the exit event, *i.e.* termination, but not the creation event, *i.e.* overstaffing. Without a ruling by the District Court on both issues of "pretext" Steere believes she is entitled to a remand of this case; if not judgment in her favor, as a matter of law, based upon JSI's failure to meet its "burden of production" under *McDonnell Douglas* and *St. Mary's Honor Center.*

On appeal, the United States Court of Appeals for the Tenth Circuit summarily affirmed the District Court's decision. In rejecting Steere's argument that JSI was required, as part of its burden of production, to offer a legitimate, nondiscriminatory reason why it created the overstaffing of AIS in the first place, the court found that it could not address this issue based on Steere's submission of only the lower court's rulings and a portion of the record (App. E, 46a). In response Steere simply believes that the trial court's conclusions of law that JSI met its "burden of production" can be seen to be clearly erroneous on the face of the District Court's written findings of January 6, 1997 (App. C, 9a-11a).

REASONS FOR GRANTING THE WRIT

McDONNELL DOUGLAS AND *BURDINE* STILL REQUIRE EVIDENCE OF A RATIONAL, NON-DISCRIMINATORY REASON BY THE DEFENDANT EMPLOYER FOR ARTIFICIALLY CREATING AN "OVERSTAFFING" SITUATION AS PART OF THE EMPLOYER'S "BURDEN OF PRODUCTION" EVEN AFTER THIS COURT'S OPINION IN *ST. MARY'S HONOR CENTER.*

Review of this case provides an important opportunity to correct a tendency to gloss over, if not ignore, prior rulings of this court on the purpose of the employers' "burden of production" in Title VII cases. The factual matrix presented by the District Court's opinions illustrates the subtle, evolutionary development of "pretext" or disguised discrimination where the employer, in its burden of production, articulates reasons for the female employee's termination as a "reduction in force" but offers no explanation as to why they artificially created such an "overstaffing" situation in the first place. Failure to require the employer to meet their "burden of production" or explain the entire situation, both beginning and ending, diminishes Title VII's protection against sexual discrimination.

The basic allocation of burdens and order of proof in a Title VII case alleging disparate treatment by indirect evidence is set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). This analysis was further developed in this Court's opinions in *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 99 S. Ct. 295, 58 L. Ed. 2d 216 (1978); *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 98 S. Ct. 2943, 57 L. Ed. 2d 957 (1978); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981); *United States Postal Service Board v. Aikens*, 460 U.S. 711, 103 S. Ct. 1478, 75 L. Ed. 2d 403 (1983);

and, most recently, in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993).

The "burden of production" is Step 2 in the three step process in the *McDonnell Douglas* burden of proof, ultimate burden of persuasion, analysis. *St. Mary's Honor Center*, 509 U.S. at 113 S. Ct. at 2747. At this stage the defendant is required to articulate a legitimate, non-discriminatory reason for the actions taken to rebut the employee's prima facie case. *Burdine*, 450 U.S. at 254, 101 S. Ct. at 1094.

The purpose of the defendant's production is to provide the employee with the specific factual statement or reasons they must address in crafting their evidence to carry the ultimate burden of proof. *Burdine*, *supra*, 450 U.S. at 256-257, 101 S. Ct. at 1095. In theory, this process moves the case to a more focused or higher level of inquiry. *Id.* at 255, 101 S. Ct. at 1095.

A problem develops in the fully tried case when the defendant employer either does not rebut the employee's prima facie case (the asserted result here) or the trier of fact does not find the reasons articulated by the defendant employer persuasive, *i.e.* not the real reason the defendant fired the employee. In *Burdine*, 450 U.S. at 254, 101 S. Ct. at 1094, this Court stated that in either situation the ". . . District Court must enter judgment for the plaintiff because no issue of fact remains in the case." The *Burdine* opinion further emphasizes the point by stating that: "[t]he explanation provided [by the defendant] must be legally sufficient to justify a judgment for the defendant." *Id.* 450 U.S. at 255, 101 S. Ct. at 1094 (emphasis added). This result now appears to have been changed by the majority opinion in *St. Mary's Honor Center* which "permits" the trier of fact to infer the ultimate fact of discrimination by rejecting the defendant's proffered reasons but that such a determination does not "compel" a judgment for the employee as a matter of law. *Id.* 113 S. Ct. at 2742 and n.4 at 2742.

The *St. Mary's Honor Center* opinion does not, however, change the mandate of *Burdine* on the first proposition — if the defendant does not rebut the employee's prima facie case the trial court must enter judgment for the employee as a matter of law. *Burdine*, 450 U.S. at 454, 101 S. Ct. at 1094 and *St. Mary's*, __ U.S. __, 113 S. Ct. at 2748 and n.3 at 2748-2749.

The decision of the District Court in this case, summarily affirmed by the United States Court of Appeals for the Tenth Circuit, demonstrates the danger inherent in oversimplifying the *McDonnell Douglas* scheme in today's subtle world of corporate or business downsizing when the termination event is not the entire discriminatory act upon which the employee bases their claim. The petitioner here tried her case on the basis that both the "overstaffing" *and* the "termination" (as a reduction in force) were part and parcel of the same discriminatory event. In its conclusions the District Court, for whatever reason, simply did not address the entire alleged discriminatory course of conduct but only the termination event. (App. C, 15a-16a). To avoid specifically following the *McDonnell Douglas* scheme and addressing, in a formal factual finding, the defendant's successes or failures with respect to the "burden of production" in Step 2, the District Court simply reiterated the statement in *Burdine*, 250 U.S. at 255, n.10, 101 S. Ct. at 1095, n.10, that in a fully tried case, "burden shifting" becomes irrelevant and simply ". . . drops from the case." *St. Mary's* 113 S. Ct., at 2737. In the face of this language, a finder of fact may be confused as to whether there should be some formal recognition (as Steere believes) in the written opinion or a finding on the response or lack of response to each and every alleged discriminatory act established in the employee's prima facie case.

A recent case from the United States Court of Appeals for the Tenth Circuit, *Greene v. Safeway Stores, Inc.*, 98 F.3d 554, 556 (10th Cir. 1996) illustrates the Petitioner's contention that confusion still persists over the use of the *McDonnell Douglas*

scheme. The Appellate opinion in *Greene* quotes the District Court's quandary as to how to use, or even whether to use, Step 2 of the *McDonnell Douglas* scheme in a fully tried case when the District Court felt compelled to enter a directed verdict on a portion of the employee's claims because in his view the plaintiff had not presented a prima facie case and the employer moved to dismiss.

Without a "definitive rule," or at least more specific guidance, the lower courts will continue to have confused or conflicting views over the procedural effect of the defendant's "burden of production" in a fully tried case after *St. Mary's Honor Center* if the employer does not present evidence. The instant case illustrates the danger of the imprecise understanding of the procedural scheme. The net result is a substantive denial of the employee's rights under Title VII which upsets the balance of Title VII between employee rights and employer prerogatives. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 243, 109 S. Ct. 1775, 1786, 104 L. Ed. 2d 268 (1989).

CONCLUSION

Based upon the reason stated, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A — ORDER AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT FILED MARCH 3, 1997

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 96-1050
(D.C. No. 94-B-2289)
(D. Colo.)

LOIS KAY STEERE,

Plaintiff-Appellant,

v.

JEPPESEN SANDERSON, also known as Jeppesen Sanderson, Inc.,

Defendant-Appellee.

ORDER AND JUDGMENT*

Before BRORBY and KELLY, Circuit Judges, and CAUTHRON,** District Judge.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

** Honorable Robin J. Cauthron, District Judge, United States District Court for the Western District of Oklahoma, sitting by designation.

Appendix A

After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f), 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Defendant terminated plaintiff's employment. In response, plaintiff commenced this action alleging sex discrimination in violation of 42 U.S.C. §§ 2000e-2000e-17 and state law claims of breach of an implied contract of employment and public policy wrongful discharge.[1] After trial to the court, the district court made findings of fact and conclusions of law and entered judgment in favor of defendant. On appeal, plaintiff argues (1) the district court erred in determining that she did not prove sex discrimination; (2) the district court erred in concluding defendant did not breach provisions of its human resources manual; and (3) the district court erred in concluding her termination did not violate public policy. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

We review the district court's findings of fact for clear error and its conclusions of law de novo. *See Pierce v. Underwood,* 487 U.S. 552, 558 (1988). When reviewing findings of fact, we consider the record in its entirety. *See Anderson v. City of Bessemer City,* 470 U.S. 564, 573-74 (1985). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.,* 333 U.S. 364, 395 (1948). In conducting de novo review, "no form of appellate deference is acceptable." *Salve Regina College v. Russell,* 499 U.S. 225,

1. Plaintiff also raises other claims, but she does not challenge the district court's disposition of those claims on summary judgment.

238 (1991) (discussing de novo review of state law determinations by district courts).

Plaintiff first argues that the district court erred in determining that she did not prove sex discrimination. Plaintiff maintains that the reason defendant offered for her termination, that her department was overstaffed, was pretext.

Under Fed. R. App. P. 10(b)(2), an appellant is charged with providing a sufficient record to review evidentiary findings or conclusions. The appellant must provide all portions of the transcript necessary to give the court of appeals a complete and accurate record of the proceedings related to the issue on appeal. *See King v. Unocal Corp.*, 58 F.3d 586, 587 (10h Cir. 1995) (citing 10th Cir. R. 10.1). Plaintiff recognizes that all evidence must be considered to determine whether defendant's explanation for her termination was pretext and whether she was discriminated against on the basis of sex. *See* Appellant's Opening Br. at 9, 13, 16. Contrary to the clear mandate to provide the record and her recognition that a review of all of the evidence is needed, plaintiff provided for our review only four trial exhibits and seventeen pages of the transcript of the two-day trial.[2] Based on those seventeen pages, we know the total transcript exceeded 463 pages. Without a transcript of all of the evidence relating to plaintiff's claim of sex discrimination, the evidentiary record is insufficient to permit assessment of the claim. We have no obligation to remedy any failure of plaintiff and her attorney to see that the record is sufficient to consider and determine the issues on appeal. *See King*, 58 F.3d at 587.

---

2. Only three of the exhibits and six pages of the transcript relate to the sex discrimination claim. The other exhibit and five pages of transcript relate to the implied contract claim, and six pages of transcript apply to the public policy issue.

Accordingly, we must affirm the district court's determination that plaintiff was not terminated on the basis of sex. *See McGinnis v. Gustafson*, 978 F.2d 1199, 1201 (10th Cir. 1992) (stressing importance and mandatory nature of court nobles governing provision and use of transcripts); *Deines v. Vermeer Mfg. Co.*, 969 F.2d 977, 979-80 (10h Cir. 1992).

Plaintiff argues the district court improperly applied the standard for summary judgment in discussing whether she presented a prima facie case of sex discrimination. She also maintains the district court imposed an improper burden of proof by failing to use the word "indirectly" in stating her burden for proving pretext. Having reviewed the district court's order and the case law cited therein, we conclude the district court applied the proper burden of proof and did not apply summary judgment standards to decide this case.

Plaintiffs raises two other arguments on appeal: (1) the district court erred in concluding that defendant did not breach an implied employment contract allegedly provided by the human resources manual, and (2) the district court erred in determining her termination did not violate public policy when the evidence allegedly showed she was wrongfully discharged in retaliation for challenging her supervisor's decision to forgo publishing revisions reflecting a change in radio frequency for an airport in South Carolina. These arguments also concern district court findings and determinations based on the evidence. Because plaintiff provided insufficient portions of the transcript to review these arguments, we are effectively barred from any substantive review of them and must affirm the district court. *See McGinnis*, 978 F.2d at 1201.

Appendix A

The judgment of the United States District Court for the District of Colorado is AFFIRMED.

Entered for the Court

Robin J. Cauthron
District Judge

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO FILED JANUARY 8, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 94-B-2289

LOIS KAY STEERE,

Plaintiff,

v.

JEPPESEN SANDERSON, INC.,

Defendant.

JUDGMENT

PURSUANT TO and in accordance with the Findings of Fact, Conclusions of Law and Order filed January 5, 1996, by the Honorable Lewis T. Babcock, United States District Judge, it is

ORDERED THAT judgment is entered in favor of the defendant, Jeppesen Sanderson, Inc., and against the plaintiff, Lois Kay Steere, on all of plaintiffs claims, and the cause of action and complaint are dismissed with prejudice. It is

FURTHER ORDERED that defendant shall have its costs upon the filing of a bill of costs within ten days of the entry of judgment.

Appendix B

DATED at Denver, Colorado, this 8th day of January, 1996.

FOR THE COURT:

JAMES R. MANSPEAKER, CLERK

By: s/ Stephen P. Ehrlich
Stephen P. Ehrlich
Chief Deputy Clerk

APPENDIX C — FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FILED JANUARY 5, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Lewis T. Babcock, Judge

Civil Action No. 94-B-2289

LOIS KAY STEERE,

Plaintiff,

v.

JEPPESEN SANDERSON, INC.

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Trial to the court was held on January 2, 3, and 4, 1996. Jurisdiction is proper pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1367(a). Venue is proper under 28 U.S.C. § 1391(b). Plaintiff, Lois Kay Steere (Steere) asserts claims against defendant Jeppesen Sanderson, Inc. (JSI) for sex discrimination in violation of Title VII, Civil Rights Act of 1991, 42 U.S.C. § 2000e *et seq.* and state claims for breach of implied contract and public policy wrongful discharge. Having heard the testimony of the witnesses, reviewed the admitted exhibits, and considered the parties' contentions, I find in favor of the defendant on all claims.

Appendix C

I. FINDINGS OF FACT

Plaintiff, Lois Kay Steere, a female, was hired by JSI on September 15, 1989 as an analyst in the Aviation Information Section (AIS), Englewood, Colorado. She was employed as a senior analyst in AIS when she was laid off by JSI on December 10, 1993. JSI advised her that her position was being eliminated to reduce the number of employees in her work section.

JSI is a publisher of flight information, training aids, and audiovisual programs for airlines, pilots, and general aviation markets throughout the world. During the pertinent times, JSI employed over 600 individuals in its Englewood offices.

As a senior flight information analyst, it was Steere's job to analyze flight information source material received from the United States and governments of different countries to determine its effect on JSI charts, texts, and automated systems to resolve conflicting or questionable flight information. She also screened and disseminated such material to the appropriate JSI sections for processing.

JSI also maintained a 3 person liaison AIS office in Washington, D.C. to obtain Federal Aviation Administration (FAA) flight information and transmit it to the Englewood office. For economic reasons, in 1993 JSI eliminated a position in the Washington, D.C. office. In June, 1993, JSI offered Thomas Lawson (Lawson), the employee whose position had been eliminated, the choice of being laid off or relocating to the Englewood office. Lawson, a JSI employee for 21 years, accepted relocation.

Lawson, who eventually assumed Steere's duties,

transferred to Englewood in September, 1993, and was assigned to the AIS section. This move resulted in overstaffing of the AIS section by one analyst position. Rather than acting immediately to correct the overstaffing, JSI decided to wait until the end of the calendar year in hopes of an increased workload to justify an additional position or to deal with the overstaffing through attrition. On November 30, 1993, no one having left AIS and the workload not warranting an additional position, Horst Bergmann, company president, wrote a memorandum to senior management to act immediately to reduce AIS by one position.

On December 3, 1993, Robert Muller (Muller), JSI's human resources director, met with AIS supervisor Greg Fisher (Fisher), manager of data development Doug Higgins (Higgins), and Don Sellars (Sellers), director of flight information data and design to determine which AIS employee would be laid off. In reaching this decision, the management group evaluated all twelve AIS analysts, including Lawson. Without any discussion among themselves, the four managers each reviewed every analyst's personnel file. Each manager then named their lay off candidate. Each of the managers named Steere to be laid off.

During her years with JSI, Steere's overall performance ranged from "needs improvement" to the low end of "solid performer." The testimony of several witnesses including Steere's supervisors and co-workers, established that her work was often inaccurate and incomplete. Moreover, these witnesses testified that she was reluctant to assist others, had interpersonal problems with co-workers, and was generally difficult to deal with. There was also compelling evidence that Steere often spent company time working on personal matters including writing a novel.

Appendix C

In response to these problem areas, over the years Steere was counseled by her supervisors, her assignment was changed, she was given oral warnings, and was placed on probation from August 1990 to November 1990 which was extended until January, 1991 at which time she was performing satisfactorily. Approximately one month before the meeting to select the AIS analyst for layoff, Steere's supervisor, Greg Fisher, had considered placing Steere on probation once again for reoccurring problems.

Steere's personnel file contained memoranda and documentation regarding her probation in 1991. However, the management personnel who made the layoff determination had prior, independent knowledge of Steere's probation. Moreover, Muller, Fisher, and Higgins testified that this information was not a material factor in the decision to lay off Steere. In addition, probationary material from 1987 appeared in another (male) analyst's file.

Two male AIS analysts had personal difficulties in 1990 which affected certain aspects of their job performance such as absenteeism and verbal communications. However, their performance was otherwise satisfactory or better than satisfactory. They resolved their respective issues and each thereafter achieved performance ratings of "exceeding expectations" for the two 6 month evaluation periods prior to the layoff.

JSI had a Human Resources Operations Manual (HRM), the stated purpose of which was "to provide supervisory and managerial personnel with a convenient reference to company human resources policies and procedures." (Exh. 10 p. 108). This manual was distributed only to supervisory and managerial

employees and kept in their offices. However, employees had access to it at any time and were free to copy or review it.

The HRM addressed, *inter alia,* layoffs, probation and overtime. Section 3.5.7 provided:

> *Refusal to work overtime*: Full cooperation of all employees is necessary to prevent hardship on any one group of employees. Employees that desire not to work overtime will not be required to do so when other qualified employees of the same department desire to work. Holding a second job will not be sufficient ground for refusal to work overtime.

Section 1.8.1 provides, in part:

> In the event it is necessary to reduce the employee staff, ability, performance and necessity of the position to the Company will be factors used in determining which employees will be affected.

Section 1.3.6 provides, in part:

> The material in the employees' personnel file reflecting the warnings and the probationary status will be retained for no longer than two years, then removed and destroyed.

Also, testimony established that performance reviews and supporting documentation were kept in personnel files for five years.

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Steere bases her public policy wrongful discharge claim on a decision by her supervisor and a manager not to process a chart revision she had proposed. JSI processes hundreds of these changes daily, and discussions of whether to process specific changes were common. These changes were governed by written JSI criteria and often required the exercise of judgment in determining the propriety and exigency of a change.

In October 1993, JSI manager Marv Stine was spearheading a special project to review and develop processing criteria and a program to train analysts in the use of good judgment in determining when to and when not to process revisions. As part of this project, Stine reviewed all changes processed by the AIS analysts and would discuss with analysts the reasons for processing or not processing selective revisions they had submitted. During this review, he pulled a revision Steere had submitted for an airport in Aiken, South Carolina. He approached her to discuss with her whether it should be processed. She disagreed with his assessment that the change should not be processed. According to the procedures established for this special project, Stine then consulted with AIS supervisor Fisher who agreed that the change need not be processed because pilots had means other than the chart in question to learn of the change. Stine and Fisher returned and discussed with Steere the reasons for their respective positions. After this discussion, Stine and Fisher exercised their authority and pulled the revision. Neither Stine nor Fisher documented this incident or mentioned it to any other supervisory or management employee. Steere did not report her disagreement with their decision to any other management person. Steere presented no evidence to show a nexus between this discussion and her layoff other than the fact that this discussion occurred approximately two months before the layoff.

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Steere called one former employee, Eliza Harvey-Dennis, to testify in support of her claim of an alleged pattern or practice of sex discrimination by JSI. Harvey-Dennis worked in the same building as Steere. In one of the positions she held, she reported to Richard Fosnot, a supervisor who had supervised Steere in AIS. Harvey-Dennis' perception was that Fosnot favored men over women in assigning special projects, cross-training, and work schedules. She also testified that she told Higgins about Fosnot and that he agreed that Fosnot had a problem working with women. Harvey-Dennis testified that she resigned from JSI because of Fosnot's treatment of women. However, Harvey-Dennis' resignation letter makes no mention of Fosnot. (Exh. V). Also Higgins flatly contradicted Harvey-Dennis' testimony that she told him about her concerns about Fosnot. I find Harvey-Dennis' testimony is not credible.

Steere was informed of JSI's decision and laid off on December 10, 1993. She was given two weeks pay in lieu of notice, seven weeks severance pay, and compensation for any unused holidays and vacation. On January 4, 1994, Steere filed a charge of sex and/or age discrimination with the Colorado Civil Rights Division ("CCRD") on January 4, 1994. The CCRD then sent the charge to the Equal Employment Opportunity Commission for "dual filing purposes." After an investigation, the CCRD concluded on June 17, 1994 that there was no "probable cause to credit [Steere's] allegation." On September 15, 1994, Steere filed complaint 24-CV-2013 in the Arapahoe County District Court. On October 5, 1994, Jeppesen removed the action to this court. Summary judgment was entered November 28, 1995 for Jeppesen on Steere's claims for age discrimination, promissory estoppel, breach of contract based on handbook provisions on harassment and retaliation (except as pertains to her public policy wrongful discharge claim). Steere

seeks reinstatement, back pay and allowances, and employee benefits.

III. CONCLUSIONS OF LAW

A. Sex Discrimination Claim

To establish a prima facie case of sex discrimination under Title VII of the Civil Rights Act of 1964 as amended by the Civil Rights Act of 1991, 42 U.S.C. 2000(e) *et seq.*, Steere must show that she (1) was a member of a protected group, (2) was doing satisfactory work, (3) was discharged or the subject of an adverse employment decision despite the adequacy of this work, and (4) was replaced by or treated less favorably than a similarly situated employee of the opposite sex. *Randle v. City of Aurora*, 69 F.3d 441, 451 and n.13 (10th Cir. 1995); *Cole v. Ruidoso Municipal Schools*, 43 F.3d 1373, 1380 (10th Cir. 1994). Once Steere establishes a prima facie case of gender discrimination, the burden of production shifts to JSI to articulate a nondiscriminatory reason for the adverse employment action. *Cole*, 43 F.3d at 1380. This burden of production does not require JSI to explain any differences in treatment between Steere and the other AIS analysts. "[I]t is not a comparative step." *EEOC v. Flasher Co.*, 986 F.2d 1312, 1318 (10th Cir. 1992). At trial, the presumption that arose in Steere's favor if she established a *prima facie* case "simply 'drops from the case,' *Flasher*, 986 F.2d at 1316 (quoting *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981)). Thus, she had the burden of proving intentional illegal sex discrimination by either presenting direct evidence of discrimination or by showing that JSI's proffered reasons for its actions "concealed a motive of discriminating against [her] in violation of the civil rights laws" and were, thus, unworthy of belief. *Randle*, 69 F.3d at 453 n. 18.

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The evidence established that JSI made a legitimate and good faith business decision that the AIS department was overstaffed. JSI then made another legitimate and good faith business decision to deal with the overstaffing by laying off one AIS analyst. The evidence proved that JSI used a rational, logical, and non-discriminatory process to select the analyst to be laid off. Testimony established that JSI used the criterion of selecting for layoff the analyst who was contributing the least to the AIS section. Under this criterion, Steere was unanimously selected for layoff. There was no persuasive evidence that gender bias permeated the various analysts' periodic performance review reports. Rather, Steere was selected because her performance was, in fact, the poorest among the AIS analysts. Steere attempted to show that JSI's proffered reason was pretextual by introducing evidence that similarly-situated males were less qualified than she and should have been laid off. However, her evidence failed to support her allegations of pretext and, thus, her sex discrimination claim must fail.

I recognize that in comparing employee qualifications I am not to review or second guess the propriety of JSI's business decisions. *Faulkner v. Super Valu Stores, Inc.*, 3 F.3d 1419, 1426 (10th Cir. 1993); *Lucas v. Dover Corp.*, 857 F.2d 1397, 1403-04 (10th Cir. 1988). Moreover, human relationships are inherently complex. Large employers must deal with a multitude of employment decisions, involving different employees, different supervisors, different time periods, and an array of facts that will inevitably differ even among seemingly similar situations. The law does not require, nor should it, employers to treat all employees all of the time in all matters with absolute, antiseptic, equality. *Flasher Co.*, 986 F.2d at 1319.

In addition "[i]t is error to assume . . . that differential

treatment between a [female] employee and [male] employee[s] that is not explained by the employer in terms of a rational, predetermined business policy must be based on illegal discrimination because of an employee's protected class characteristics. Such an assumption is neither correct under the law nor is it an accurate reflection of reality." *Id.* at 1319-20. If male analysts' performance ratings were not reduced while Steere's were, JSI is not required under Title VII to prove why this differential treatment occurred. *Id.* at 1320. Rather, it is Steere's burden to prove that it was caused by intentional discrimination against her on the basis of her gender. *Id.* Steere has not met this burden.

B. Pattern and Practice Sex Discrimination.

In order to establish a *prima facie* case that JSI engaged in a pattern or practice of sex discrimination, Steere must prove by a preponderance of the evidence that sex discrimination was Jeppesen's standard operating procedure, *i.e.*, the regular rather than the unusual practice. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 336 and n.16 (1977); *Pitre v. Western Electric Co.*, 843 F.2d 1262, 1267 (10th Cir. 1988). Proof of isolated or sporadic discriminatory acts is insufficient to make out a *prime facie* case of pattern or practice discrimination. *Teamsters*, 431 U.S. at 336; *Pitre*, 843 F.2d at 1267.

Witnesses providing anecdotal testimony for the purpose of proving pattern or practice sex discrimination must have been similarly situated to the plaintiff in order for their testimony to be relevant to show " 'standard [discriminatory] operating procedure' and a 'regular rather than unusual' practice of discrimination." *Mooney v. Aramco Services Co.*, 54 F.3d 1207,

1221 (5th Cir. 1995) (quoting *Teamsters*, 431 U.S. at 336); *cf. Cone v. Longmont United Hospital Ass'n*, 14 F.3d 526, 532-33 (10th Cir. 1994).

The only evidence offered by Steere besides her own testimony was the testimony of Harvey-Dennis who, if believed, raised only isolated or sporadic incidents of alleged discrimination. Harvey-Dennis' testimony was not credible and Steere herself failed to present sufficient evidence of concrete examples of sex discrimination to meet her burden of proof. *Coser v. Moore*, 739 F.2d 746, 751-52 and n.2 (2d Cir. 1984); *see Mooney*, 54 F.3d at 1221; *Woodbury v. New York City Transit Authority*, 832 F.2d 764, 771 (2d Cir. 1987) (anecdotal testimony insufficient to support district court's finding of discrimination); *Sears v. Bennett*, 645 F.2d 1365, 1370-71 (10th Cir. 1981), *cert. denied*, 456 U.S. 964 (1982). Thus, I conclude that Steere has failed to meet her burden to prove that JSI engaged in a pattern and practice of sex discrimination.

C. Breach of Implied Contract (Continued Employment)

Steere alleges JSI breached an "implied contract . . . of continued employment with defendant . . ." based upon Jeppesen's Human Resources Manual. Steere alleges that she had an expectation of continued employment so long as her performance was adequate. Specifically, she alleges that Jeppesen failed to adhere to sections 1.3.6 and 3.5.7 which resulted in her layoff.

An employee hired for an indefinite period of time is presumed to be an at-will employee whose employment may be terminated by either party without cause and without notice. *Continental Air Lines, Inc. v Keenan*, 731 P.2d 708 (Colo. 1987).

Moreover, Steere testified that she understood her employment with JSI was "at will" and also that she could be laid off.

However, the presumption of at-will employment is not absolute. *Continental Air Lines, Inc v. Keenan,* 731 P.2d at 711-12 (Colo. 1987). An employee may show that an employee handbook is enforceable as a unilateral contract of employment. *Id.* at 711 n.1. Distribution to employees of handbooks or policy manuals which contain specific procedures for termination of employment, when relied on by an employee and supported by the consideration of continued service, may result in the employer becoming contractually bound to comply with those procedures. *Churchey v. Adolph Coors Co.,* 959 P.2d 1336, 1338 (Colo. 1988); *Keenan,* 731 P.2d at 711. In order to find the existence of an implied contract, however, the employee must demonstrate that the requisites for contract formation — offer, acceptance and consideration — have been met. *Id.; cf. Tuttle v. ANR Freight Systems, Inc.,* 797 P.2d 825, 829 (Colo. App. 1990). In order to be effective, an offer must be communicated. *Kuta v. Joint District No. 50(J),* 799 P.2d 379, 382 (Colo. 1990).

Based on Steere's own testimony, I conclude that JSI did not offer her, expressly or impliedly, a contract for continued employment. Thus, Steere has failed to establish the existence of an implied contract between herself and Jeppesen for continued employment. *See Morgan,* 867 F.2d at 1029.

Even if the HRM were to form the basis for a contract between JSI and Steere, the evidence shows that Steere was laid off in accordance with section 1.8.1, the manual's provision regarding layoffs. First, the evidence established the need for the layoff. Next, although Steere's performance was rated as

satisfactory during the evaluation periods considered in ranking the AIS analysts, her fellow analysts were objectively better performers. Also, more subjective but equally valid factors weighed against Steere. Her relationships with her co-workers were problematic. She had ongoing communication problems with many employees in other JSI departments. And there was abundant credible evidence that Steere repeatedly worked on personal matters on company time.

Steere also relies on the HRM's policies about personnel files and overtime, sections 1.3.6 and 3.57, respectively, in support of her breach of contract claim. The evidence failed to support her allegations that these sections were breached. However, even if these sections were breached, these breaches do not provide a basis to challenge her selection to be laid off. The evidence established that the documentation in Steere's file concerning her earlier probation did not materially influence the decision to lay her off.

Steere also maintains that JSI breached its overtime provision which allows an employee to refuse to work overtime so long as another employee is willing to work overtime. However, section 3.5.7 also requires employees to cooperate by working overtime and allows for overtime to be distributed evenly among co-workers in a department. Steere worked a total of 12.2 hours of overtime in 1993, all of which was worked solely in response to a written directive by her supervisor. In contrast, in 1993 her AIS co-workers worked substantial multiples of her overtime. She effectively avoided overtime during her entire tenure with JSI. Steere's resistance to her supervisors' efforts to distribute the load does not constitute cooperation. Thus, even if the HRM is considered a contract, Steere breached or, at the very least did not substantially perform

with respect to the manual's overtime provision and she cannot now recover for an alleged breach of this provision. *See Western Distributing Co. v. Diodosio,* 841 P.2d 1053, 1059 (Colo. 1992) (plaintiff has burden of proving substantial performance or justification for nonperformance as critical element of breach of contract claim).

D. Wrongful Discharge In Violation of Public Policy Claim

The claim of a public policy wrongful discharge is a narrow exception to the employment at-will doctrine in Colorado. *Meehan v. Amax Oil & Gas, Inc.,* 796 F. Supp. 461, 468 (D. Colo. 1992); *Smith v. Colorado Interstate Gas Co.,* 777 F. Supp. 854, 857 (D. Colo. 1991) (public policy wrongful discharge not a "generalized tort"). To establish a claim under Colorado law for wrongful discharge in violation of public policy, a plaintiff must show:

> that the employer directed the employee to perform an illegal act as part of the employee's work related duties or prohibited the employee from performing a public duty or exercising an important job-related right or privilege; that the action directed by the employer would violate a specific statute relating to the public health, safety, or welfare, or would undermine a clearly expressed public policy relating to the employee's basic responsibility as a citizen or the employee's right or privilege as a worker, and that the employee was terminated as a result of refusing to perform the act directed by the employer. To these

> elements we add the additional requirement that the employee present evidence showing that the employer was aware, or reasonably should have been aware, that the employee's refusal to comply with the employer's order or directive was based on the employee's reasonable belief that the action ordered by the employer was illegal, contrary to clearly expressed statutory policy relating to the employee's duty as a citizen, or violative of the employee's legal right or privilege as a worker.

Martin Marietta Corp. v. Lorenz, 823 P.2d 100, 109 (Colo. 1992). The public policy wrongful discharge claim was explained in *Meehan* as follows:

> This exception is designed to prevent an employer from placing an employee in the position of keeping a job only by performing an illegal act, forsaking a public duty (such as jury service), or foregoing a job-related right or privilege (such as filing a worker's compensation claim).

796 F. Supp. at 468.

In this case, Steere has failed to prove her public policy wrongful discharge claim. Her testimony about the content and nature of her conversations with Fisher and Stine about the safety issue at the Aiken, South Carolina airport was flatly contradicted by them and by her co-worker, Roger Gingerich.

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Stine testified that as a routine part of a quality control project he reviewed revisions for all AIS analysts to determine if a proposed revision was necessary. If he disagreed with the analyst's recommendation, he pulled the paperwork and discussed it with the analyst. In this case, he approached Steere to discuss her recommendation for a revision in the Aiken, South Carolina charts, obtained a second opinion from her supervisor, Fisher, again consulted with Steere and determined not to process the revision. It is uncontested that the chart change proposed by Steere in 1993 has still not been done.

There is no evidence to suggest that by pulling the revision proposed by Steere, JSI required Steere to perform an illegal act, required her to forego a right or privilege or prohibited her from performing any public duty. *See Lampe v. Presbyterian Medical Center,* 590 P.2d 513 (Colo. App. 1978). Moreover, Steere did not present any credible evidence that she faced any discipline or penalty based on this incident. Most critically, Steere presented no evidence of a nexus between the difference of opinion and her layoff, arguing only that the latter followed the former by two months. I conclude that Steere has not met her burden of proof on her public policy wrongful discharge claim. *See Lay v. St. Louis Helicopter Airways, Inc.,* 869 S.W.2d 173, 176-77 (Mo. App. 1993); *Aiken v. Business and Industry Health Group, Inc.,* 886 F. Supp. 1565, 1571 (D. Kan. 1995).

Accordingly, it is ORDERED that:

1. all of plaintiff's claims are DISMISSED WITH PREJUDICE;

2. judgment shall enter in favor of defendant Jeppesen Sanderson, Inc. and against plaintiff Lois Kay Steere on all her claims;

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3. defendant is awarded costs.

Dated: January 5, 1996 in Denver, Colorado.

BY THE COURT:

s/ Lewis T. Babcock
LEWIS T. BABCOCK, JUDGE

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO FILED NOVEMBER 28, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Lewis T. Babcock, Judge

Civil Action No. 94-B-2289

LOIS KAY STEERE,

Plaintiff,

v.

JEPPESEN SANDERSON, INC.

Defendant.

ORDER

In this employment discrimination action, defendant, Jeppesen Sanderson, Inc. (JSI) moves for summary judgment pursuant to Fed.R.Civ.P. 56 on the claims of plaintiff, Lois Kay Steere (Steere) for violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* (ADEA), sex discrimination in violation of Title VII, Civil Rights Act of 1991, 42 U.S.C.. § 2000e *et seq.*, state claims for breach of contract, and retaliatory discharge. Oral argument would not materially assist me in determining the motion. After consideration of the motion and briefs filed in this matter, I grant in part and deny in part defendant's summary judgment motion.

Appendix D

I.

Plaintiff Lois Kay Steere, a female, was hired by JSI on September 15, 1989 as an analyst in the Aviation Information Section (AIS), Englewood, Colorado. She was employed as a senior analyst in AIS until her employment was terminated by JSI on December 10, 1993. (Muller Aff. p. 1) after JSI advised her that her position was being eliminated to reduce the number of employees in her work section. (Amended Answer ¶¶5-8). JSI is a publisher of flight information, training aids, and audiovisual programs for airlines, pilots, and general aviation markets throughout the world. (Muller Aff. p. 1) According to JSI, a senior flight information analyst's job is to analyze flight information source material received from the governments of different countries to determine its effect on JSI charts, texts, and automated systems to resolve conflicting or questionable flight information. (Pltf. Exh. B). Analysts also screen and disseminate such material to the appropriate section for processing. *Id.*

Steere holds a United States airline transport pilot certificate, a single-engine commercial pilot certificate with instrument rating, certified flight instructor certificate for airplanes single-engine land, multi-engine land and instrument, advanced ground instructor certificate, and instrument ground instructor certificate. Steere has accumulated approximately 4000 hours of flight. (Steere Aff. ¶4).

JSI maintained an office in Washington, D.C. to obtain Federal Aviation Administration (FAA) flight information and transmit it to the Englewood office. (Muller Aff. p. 2) In 1993, JSI decided to reduce its employees in the Washington, D.C. office from three to two employees. *Id.* In June, JSI offered one

of the Washington employees, Thomas Lawson (Lawson), the choice of being laid off or relocating to the Englewood office. Lawson, who was 46 years old and a JSI employee for 21 years, accepted relocation. *Id.*

Lawson transferred to Englewood and was assigned to the AIS section which resulted in that section being over staffed by one analyst position. (Muller Aff. p. 2) Rather than acting immediately to correct the overstaffing, JSI decided to wait until someone left the section voluntarily or until the end of the calendar year. *Id.* On November 30, 1993, no one having left AIS, Horst Bergmann, company president wrote a memorandum to management to act immediately to reduce AIS by one position. (Def. Exh. G). According to Robert Muller, JSI's human resources director, he met with AIS supervisor Greg Fisher, Doug Higgins, manager of data development, and Don Sellars, director of flight information data and design to make the decision as to which AIS employee would be laid off. *Id.* at pp. 2-3. The management group evaluated each of the twelve AIS analysts' "past performance, evaluations, knowledge, skills, ability, and past individual contributions" and decided to lay off Steere. *Id.* at p. 3.

Steere was informed of JSI's decision and terminated effective December 10, 1993. She was given two weeks pay in lieu of notice and seven weeks pay as severance and compensation for any unused holidays and vacation. *Id.* at p. 3. Steere filed a charge of sex and/or age discrimination with the Colorado Civil Rights Division (CCRD) on January 4, 1995. (Def. Exh. E; Pltf. Exh. 9). The CCRD then sent the charge to the Equal Employment Opportunity Commission (EEOC) for "dual filing purposes." (Def. Exh. E). After an investigation, the CCRD concluded on June 17, 1994 that there was no

"probable cause to credit [Steere's] allegation." (Def. Exh. F p. 1) On September 15, 1994, Steere filed complaint 94-CV-2013 in the Arapahoe County District Court. On October 5, 1994, JSI removed the action to this court. Steere seeks reinstatement, back pay and allowances, and employee benefits.

II.

Fed.R.Civ.P. 56 provides that summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, admissions, or affidavits show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The non-moving party has the burden of showing that there are issues of material fact to be determined. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A party seeking summary judgment bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, interrogatories, and admissions on file together with affidavits, if any, which it believes demonstrate the absence of genuine issues for trial. *Celotex*, 477 U.S. at 323; *Mares v. ConAgra Poultry Co., Inc.*, 971 F.2d 492, 494 (10th Cir. 1992). Once a properly supported summary judgment motion is made, the opposing party may not rest on the allegations contained in his complaint, but must respond with specific facts showing the existence of a genuine factual issue to be tried. *Otteson v. U.S.*, 622 F.2d 516, 519 (10th Cir. 1980); Fed.R.Civ.P. 56(e).

Summary judgment is also appropriate when the court concludes that no reasonable juror could find for the non-moving party based on the evidence present in the motion and response. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The operative inquiry is whether, based

on all documents submitted, reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). However, summary judgment should not enter if, viewing the evidence in a light most favorable to the nonmoving party and drawing all reasonable inferences in that party's favor, a reasonable jury could return a verdict for that party. *Anderson Liberty Lobby, Inc.*, 477 U.S. at 252; *Mares*, 971 F.2d at 494.

III.

Discrimination Claims

Steere claims she was discriminated against on the basis of her age in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.* and her sex in violation of Title VII, 42 U.S.C. § 2000e.

In both age and sex discrimination cases where plaintiff does not present direct evidence of intentional discrimination based on her age or sex, courts apply the framework developed in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973), and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-56 (1981). *Reynolds v. School Dist. No. 1*, __ F.3d __, 1995 WL 671568 (10th Cir. 1995) (race discrimination); *Ingels v. Thickol Corp.*, 42 F.3d 616, 621 (10th Cir. 1994) (ADEA); *Sperry Corp.*, 852 F.2d at 507 (ADEA); *Ramsey v. City and County of Denver*, 907 F.2d 1004, 1007 (10th Cir. 1990) (sex discrimination). Under the *McDonnell-Douglas* framework, to survive summary judgment on a circumstantial case, plaintiff must first establish a *prima facie* case of discrimination. *Reynolds*, at *6; *McDonnell Douglas*, 411 U.S. at 802. If plaintiff meets that burden, the burden shifts to defendant to proffer "some

legitimate, nondiscriminatory reason for the employee's rejection." *EEOC v. Flasher Co., Inc.*, 986 F.2d 1312, 1316 & n.4 (10th Cir. 1992) *quoting McDonnell Douglas*, 411 U.S. at 802. If the employer meets the burden of producing a facially nondiscriminatory reason for the employment decision, "the burden reverts to the plaintiff to prove that the proffered nondiscriminatory reasons are pretextual, from which a jury may infer discriminatory intent." *Reynolds, citing McDonnell Douglas*, 411 U.S. at 804. *See also St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742, 2749 (1993). In the 10th circuit, "a civil rights plaintiff may withstand a motion for summary judgment and is entitled to present his claim to the factfinder if the plaintiff established a *prima facie* case and presents evidence that the defendant's proffered nondiscriminatory reason was pretextual — i.e., unworthy of belief." *Randle*, slip. op. at 22-23 n.17. Thus, "evidence of pretext (plus *a prima facie* case) is enough to avoid summary judgment for the defendant without requiring the plaintiff to present direct evidence of an illegal discriminatory motive." *Reynolds*, slip op. at 16.

A. Age Discrimination Claim

Plaintiff must first establish a prima facie case of age discrimination by showing that she 1) was within the protected age group, 2) was doing satisfactory work, 3) was discharged despite the adequacy of this work, and 4) was replaced by a younger person. *Id.*

JSI does not dispute that Steere was within the protected age group when she was terminated but argues that some of the events she complains about occurred before she reached age forty. However, an ADEA cause of action accrues "on the date the employee is notified of an adverse employment decision."

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Hulsey v. K-Mart, Inc., 43 F.3d 555, 557 (10th Cir. 1994) *quoting Gray v. Phillips Petroleum Co.*, 858 F.2d 610, 613 (10th Cir. 1988) (citing *Delaware State College v. Ricks*, 449 U.S. 250, 256-59 (1980). Thus, Steere has proved the first prong of her ADEA *prima facie* case. However, Lawson, the Washington D.C. employee relocated to Englewood who assumed most of Steere's duties, is five years older than Steere. (Def. Exh. A p. 3) Thus, Steere cannot show that she was replace by someone younger than she, an essential element of the *prima facie* case.

Assuming *arguendo* that Steere can make out a *prima facie* case of age discrimination, defendant has proffered a legitimate, non-discriminatory reason for its decision to terminate her employment — reduction in the number of AIS staff from 12 to 11 resulting in an overstaffing of the AIS department. It is then incumbent on Steere to show direct evidence that age was a determinative factor in the defendant's employment decision, or show that the defendant's explanation for its action was merely a pretext for age discrimination. *Rea v. Martin Marietta Corp.*, 29 F.3d 1450, 1455 (10th Cir. 1994); *Cone v. Longmont United Hosp. Assoc.* 14 F.3d 526, 529 (10th Cir. 1994).

Steere offers no evidence that age had anything to do with JSI's decision to lay her off. Also, it is undisputed that since her layoff, the AIS department has continued to operate with 11 analysts. Thus, Steere has not shown that JSI's proffered reason for terminating her were a pretext for age discrimination. *See Donohue v. Unipac Service Corp.*, 847 F.Supp. 1530 (D. Colo. 1994).

Steere has not produced any evidence of animus motivated by her age. Under these circumstances, Steere has failed to meet

her burden to show "a discriminatory reason . . . motivated the employer or . . . that the employer's proffered explanation is unworthy of credence." *Burdine,* 450 U.S. at 256; *see also Rea,* at 1455. Consequently, I will grant JSI's motion for summary judgment on the ADEA claim.

B. Sex discrimination claim

Steere claims JSI discriminated against her on the basis of her sex in violation of the Civil Rights Act of 1991, 42 U.S.C. § 2000e *et seq.* by treating her differently than similarly situated male employees.

Plaintiff must first establish a *prima facie* case of disparate treatment sex discrimination by showing that she 1) was within the protected group, 2) was doing satisfactory work, 3) was discharged or the subject of an adverse employment decision despite the adequacy of this work, and 4) was replaced by or treated differently than a similarly situated employee of the opposite sex. *Id.* I find Steere has met her summary judgment burden as to the first three elements and will, as do the parties, focus on the fourth element.

Steere proffers evidence of several scenarios to oppose summary judgment on this claim. First, Thomas Lawson, a 21 year JSI male employee in the Washington, D.C. office selected to be laid off was offered relocation to Englewood in the AIS department. It is undisputed that JSI did not offer Steere, a 7 year JSI female employee, the option of transferring to another section or the option to replace a less senior employee. (Steere Aff. ¶7). Moreover, Lawson did not possess any pilot certificates as did Steere or training or experience in the duties of a flight information analyst. (Steere Aff. ¶8) Nevertheless, Lawson, a male, was relocated at company expense rather than laid off.

Under these circumstances, Steere has shown a genuine dispute as to the fourth element.

Steere also challenges the process by which she was selected as the person to be laid off in AIS after Lawson transferred in and JSI reduced the number of AIS analyst positions from 12 to 11. (Amended complaint, ¶¶20-22).

JSI management personnel Muller, Fisher, Higgins, and Sellars met to make the decision as to which AIS employee would be laid off. (Muller Aff. at pp. 2-3.) The management group evaluated each of the twelve AIS analysts' "past performance, evaluations, knowledge, skills, ability, and past individual contributions." *Id.* at p. 3. Muller reviewed performance evaluations for the 12 analysts "during [1992 and 1993] and calculated and averaged the [evaluation] scores." (Muller Aff. ¶11; Pltf. Exh. 31; Muller Depo. p. 49). These scores were:

Copley	25.25	Martin	24.67
Etherington	21.50	Pakiz	22.67
Fedorowicz	26.00	Quant	23.00
Gingerich	25.00	Steere	17.25
Higgs	23.75	Vaughn	28.67
Lawson	26.25	Ware	27.75

(Muller Aff. ¶11).

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JSI's performance scale was:

32-36 = Outstanding; 24-31 = Exceeds Expectations;

15-23 = Solid Performer; 07-14 = Needs Improvement;

00-06 = Unsatisfactory

(Pltf. Exh. 3 1 p.3 ¶8; *see also* Pltf. Exh. 7).

However, Steere proffers numerous incidents of disparate treatment over the years which, in essence, resulted in her low evaluation score as well as influencing the opinion of the management team. For example, Steere was placed on probation for "substandard work performance" from August 28, 1990 to January 16, 1991. (Pltf. Exh. 40). JSI informed Steere when she was removed from probation as a "solid performer" that "[m]aterials in [her] employee personnel file reflecting the warnings and probationary status will be retained for no longer than two years, then removed and destroyed." *Id.* However, it is undisputed that when management evaluated the twelve analysts, the unfavorable personnel action was still in her file more than 2 years later. (Muller Depo. p. 17). Also, AIS male analysts had some personnel problems including performance problems, substance abuse problems, serious communication problems, and interpersonal problems. (Pltf. Exh. 4) Also documented were unexcused absences (Pltf. Exh. 47-48) which resulted in one male analyst being considered for termination. *Id.* Despite these concerns, unlike Steere, none of the male analysts was placed on probation. Indeed, during the period Steere was placed on probation, and received a rating of 17 points, a male analyst experiencing severe problems (Pltf. Exh. 47) (Muller Depo. 12, 13, 123) received a numerical rating of 24 points. Further, male

employees were referred to the JSI employee assistance program and apparently received detailed counseling interactions with management about their various problems. *Id.* No comparative referral or intervention is documented for Steere.

This evidence is a basis for a reasonable jury to find that JSI discriminated against Steere based on her gender. Accordingly, I will deny JSI's motion for summary judgment on Steere's sex discrimination charge.

C. Sex Discrimination — Pattern and Practice

JSI also seeks summary judgment on Steere's sex discrimination claim that her "termination and employee treatment was part of a pattern and practice of discrimination against women" by JSI.

To prove a "pattern and practice" of discrimination, a plaintiff must show more than accidental or sporadic incidents of discrimination. A plaintiff must show that "discrimination was the company's standard operating procedure — the regular rather than the unusual practice." *Pitre v. Western Elec. Co.*, 843 F.2d 1262, 1267 (10th Cir. 1999) *quoting International Board of Teamsters v. United States*, 431 U.S. 324, 326 and n.16 (1977).

Steere bases her "pattern and practice" sex discrimination claim on the evidence that during Steere's seven years with JSI, she was one of only two women out of 12 analysts in the AIS. (Steere Aff. ¶5). She also points to Def. Exh. I and J as support for her position that males transferred into AIS while the vast majority of employees leaving JSI were females. However, I do not credit this evidence because it calls for comparison of two

qualitatively different circumstances — transfers into AIS and resignations and terminations from JSI.

In further support of her "pattern and practice" sex discrimination claim, Steere provides the affidavit of Eliza Harvey-Dennis which states that during her tenure as an airport analyst it became very clear to [her] the "different attitude and treatment between the male employees and the female employees." ((Harvey-Dennis Aft. ¶2) Harvey-Dennis' examples include:

1. AIS positioned the male analysts together in an area readily visible to anyone walking by the department. In contrast, the women were positioned around the corner out of sight. As a result, the women analysts did not receive questions or information from other departments.

2. May times when customers or representatives came to visit the department, they were introduced only to the male analysts and never to the female analysts.

3. Despite bringing these concerns to the attention of her supervisor, the problems continued.

4. After transferring to another department, Harvey-Dennis observed further examples of "a different attitude toward women than men" including the assignment of special projects generally given to men than women.

5. On numerous occasions her supervisor would give males information and ignore the females.

6. The supervisor yelled at another female employee in Harvey-Dennis' presence. When asked about it later, the other employee said that "he does that a lot but he is the boss."

7. Another employee, Linda Malon, and Harvey-Dennis, relayed these problems to a male manager who said that he knew there were some problems with [the supervisor] and that he was working on it.

8. Harvey-Dennis resigned her position citing her problem with the supervisor. She told JSI another position would probably solve this but she was not offered another position.

9. At her exit interview, Harvey-Dennis told the Human Resources person that the main reason she was leaving was because of the supervisor's attitude toward women. The HR person said that [we know we have a problem with [him] concerning that, and [we] are going to work on him."

(Harvey Dennis Aff.)

Under these circumstances, a reasonable jury could find that JSI engaged in a "pattern and practice" of sex discrimination. Thus, I will deny defendant's motion for summary judgment on Steere's "pattern and practice" sex discrimination claim.

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IV.

Pendent State Claims

A. Breach of Implied Contract (Continued Employment)

Defendant moves for summary judgment on Steere's breach of implied contract claim. Steere grounds this claim on JSI's Employee HandBook (Pltf. Exh. 10) and Human Resources Operation Manual. (Def. Exh. K).

An employee who is hired for an indefinite period of time is an at-will employee whose employment may be terminated by either party without cause and without notice. However, the presumption of at-will employment is not absolute. *Continental Air Lines, Inc. v. Keenan,* 731 P.2d 708 (Colo. 1987). An employee may show that an employee handbook is enforceable as a unilateral contract of employment. *Wing v. J.M.B. Property Management Corp.,* 714 P.2d 916 (Colo. App. 1985). An employer's distribution to employees of handbooks or policy manuals which contain specific procedures for termination of employment, when relied on by an employee and supported by the consideration of continued service, may result in the employer becoming contractually bound to comply with those procedures. *Churchey v. Adolph Coors Co.,* 759 P.2d 1336 (Colo. 1988); *Keenan, supra.*

JSI argues that the Human Resources Operations Manual (HROM) was by its very terms merely for the use of supervisory and managerial personnel. (Exh. K). However, Steere submits evidence that the HROM was made available to employees at any time and that employees were free to copy and review it. (Fisher Depo. p. 13). This evidence creates a genuine dispute

about whether Steere reasonably relied on the provisions in the HROM.

JSI also contends that its Human Resources Operations Manual did not serve as an offer to Steere. However, the portions supplied to me contain the following language:

> *Discharge*
>
> If the employee continues to violate Company policy during the probationary period, he/she shall be discharged at the end of the probationary period or at anytime during the probationary period if it becomes clear his/her performance is unacceptable. The supervisor must check with the Human Resources Department before taking any action of this type to insure there is *just cause* and *proper procedure* is being followed.

(Pltf. Exh. 2) (emphasis added).

Moreover, there is no evidence of an employment contract disclaimer in JSI's personnel procedures supplied to the court.

The Colorado Court of Appeals has summarized the effects of an absence of a disclaimer in employee handbooks:

> [An employer's] manifestation of willingness to be bound can be inferred if there is no disclaimer in the manual stating that it does not constitute a contract or if such disclaimer, though present, is not clear and conspicuous.

See Ferrera v. Nielsen, 799 P.2d 458 (Colo. App. 1990).

Furthermore, an employer may be found to have manifested an intent to be bound by its terms if the manual contains mandatory termination procedures or requires "just cause" for termination. *Evenson v. Colorado Farm Bureau Mutual Ins. Co.*, 1993 WL 539940, 6 (Colo. App. 1993), *cert. denied*, August 29, 1994; *Cronk v. Intermountain Rural Electric Ass'n*, 765 P.2d 619 (Colo. App. 1988).

JSI's Human Resources Manual contains provisions outlining disciplinary steps to be followed. Also, any discharge must be approved by the Human Resources Department "to insure there is just cause and proper procedure is being followed." (Pltf. Exh. 2 ¶ C). A reasonable jury could find from this evidence that an employment contract existed. *Allabashi v. Lincoln Nat'l Sales Corp.*, 824 P.2d 1 (Colo. App. 1991). Accordingly, I will deny JSI's motion for summary judgment on Steere's breach of implied contract claim.

B. Promissory estoppel claim

JSI also moves for summary judgment on Steere's claim based on promissory estoppel. I will grant the motion.

The doctrine of promissory estoppel is part of the common law of Colorado. *Vigoda v. Denver Urban Renewal Authority*, 646 P.2d 900 (Colo. 1982). Colorado courts have recognized that an employee is entitled to enforce contractual obligations under the theory of promissory estoppel. *Continental Air Lines, Inc. v. Keenan*, 731 P.2d 708 (Colo. 1987). The doctrine encourages fair dealing in business relationships and discourages conduct which unreasonably causes foreseeable economic loss because of action or inaction induced by a specific promise. *Kiely v. St. Germain*, 670 P.2d 764, 767 (Colo. 1983). Justifiable

reliance on the representations of another is the cornerstone of this action. *Id.* The doctrine as stated in section 90(1) of the *Restatement (Second) of Contracts*, is:

> A promise which the promiser should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

In *Cronk v. Intermountain Rural Elec. Ass'n*, 765 P.2d 619 (Colo. App. 1988) Cronk asserted promissory estoppel based on provisions in the company's employment manuals. The *Cronk* court noted:

> As to his first theory, we note than an employee is entitled to enforce termination procedures in an employment manual if he can demonstrate that the employer should reasonably have expected the employee to consider the manual as a commitment from the employer to follow the termination procedures, that the employee reasonably relied on the termination procedures to bus detriment, and that injustice can be avoided only by enforcement of the termination procedures. *Continental Airlines, Inc. v. Keenan, supra.*

Cronk at 624.

Steere again relies on JSI's termination procedures contained in the HROM. She claims that these provisions form the basis for promises which create an enforceable contract of employment. However, Steere fails to establish a genuine dispute that she relied on HROM procedures. Accordingly, I will grant JSI's motion for summary judgment on Steere's breach of implied contract based on promissory estoppel.

C. Breach of Contract — Sexual Discrimination

State law is preempted by Title VII if the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *California Federal Savings & Loan Assn. v. Guerra,* 479 U.S. 272, 281 (1987). Where a plaintiff asserts a tort or breach of contract claim on the same facts as a Title VII discrimination claim asserted in the same action the tort and breach of contract claims will not survive. *Price v. Public Service Co. of Colorado,* 850 F.Supp. 934, 951 (D. Colo. 1994) (breach of contract).

Plaintiff also grounds her second and fourth claims for breach of contract on violations of JSI's employee handbook provisions on sexual harassment. The facts underlying these claims are identical to those underlying her sex discrimination Title VII claim. (Def. Exh. D). Accordingly, I will dismiss plaintiff's claims two and four to the extent they are based on breach of contract for sexual discrimination.

D. Retaliatory Discharge — Public Policy Exception

Steere claims she was wrongfully discharged in retaliation for challenging her supervisor's decision to forego publishing revisions reflecting a change in radio frequency for an airport

in South Carolina. (Def. Exh. H). JSI alleges that Steere failed to exhaust her administrative remedies on her retaliation claim. (Def. S.J. Mtn p. 4-5; Def. Reply Br. p. 2-4).

Colorado recognizes a claim for wrongful discharge - public policy exception. *Martin Marietta Corp. v. Lorenz*, 823 P.2d 100, 109 (Colo. 1992). However, this is a tort claim under Colorado common law which does not require exhaustion of remedies akin to claims based on federal statutes.

The elements of this claim pertinent here are that:

1. the employer prohibited the employee from performing a public duty;

2. the action directed by the employer would violate a specific statute relating to the public health, safety, or welfare, or would undermine a clearly expressed public policy relating to the employee's basic responsibility as a citizen . . . ;

3. the employee was terminated as a result of refusing to perform the act directed by the employer; and

4. the employer was aware, or reasonably should have been aware, that the employee's refusal to comply with the employer's order or directive was based on the employee's reasonable belief that the action ordered by the employer was illegal, contrary to clearly expressed statutory policy relating to the employee's duty as a citizen. . . .

Id.

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It is undisputed that JSI is in business to analyze information used by airline pilots. It is beyond dispute that it is in the interest of public safety that pilots flying in this country have accurate flight information. In connection with her duties at JSI, Steere received documentation of a change in radio frequency at a small airport in South Carolina. In her experience as a pilot, Steere believed this was a major issue. However, when Steere submitted a revised chart reflecting the change, her supervisors refused to publish it. Steere expressed to two JSI managers her strong disagreement with the decision not to publish the revision. (Exh. H. p. 127-28). Steere also testified that after the managers left her desk, another analyst who had witnessed the exchange said "[i]f this goes to court, I'll have to get up and say [that] Kay told them somebody was going to get killed and they just as much said we don't care." *Id.* at 131. Less than two months later, Steere was selected for layoff.

Under these circumstances, Steere has raised a genuine issue of fact whether she was terminated in retaliation for her opposition to what she believed was an unsafe action by JSI. Thus, I will deny JSI's motion for summary judgment on Steere's retaliatory discharge claim.

Accordingly, it is ORDERED that:

1. defendant's motion for summary judgment on plaintiff's ADEA claim is GRANTED;

2. defendant's motion for summary judgment on plaintiff's sex discrimination claims is DENIED;

3. defendant's motion for summary judgment on plaintiff's breach of implied contract claim is DENIED;

4. defendant's motion for summary judgment on plaintiff's promissory estoppel claim is GRANTED;

5. defendant's motion for summary judgment on plaintiff's breach of contract — sexual discrimination is GRANTED;

6. defendant's motion for summary judgment on plaintiff's claim for wrongful discharge — public policy exception is DENIED;

7. defendant's motion to strike affidavits is DENIED.

Dated: November 28, 1995 in Denver, Colorado.

BY THE COURT:

s/ Lewis T. Babcock
LEWIS T. BABCOCK, JUDGE

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT FILED APRIL 2, 1997

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 96-1050

LOIS KAY STEERE,

Plaintiff-Appellant,

v.

JEPPESEN SANDERSON, also known as Jeppesen Sanderson, Inc.,

Defendant-Appellee.

ORDER
Filed April 2, 1997

Before BRORBY and KELLY, Circuit Judges, and CAUTHRON,* District Judge.

Plaintiff has filed (1) a motion to supplement the record, (2) a petition for rehearing, and (3) a request included in a letter to seal a portion of the trial transcript. Upon consideration thereof, the motion to supplement the record is denied, and accordingly, the petition for rehearing is denied as moot. The district court sealed the portion of the trial transcript. The district court's sealing order remains in full force and effect.

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* Honorable Robin J. Cauthron, District Judge, United States District Court for the Western District of Oklahoma, sitting by designation.

Appendix E

Entered for the Court
PATRICK FISHER, Clerk

By s/ Nici Akier
Deputy Clerk